



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Charles R. Spies
Clark Hill PLC
1250 Eye Street, N.W.
Suite 900
Washington, D.C. 20005

JUN 21 2011

RE: MUR 6421
Dan Benishek
Benishek for Congress and Joseph
A. Shubat, in his official capacity
as Treasurer

Dear Mr. Spies:

On November 4, 2010, the Federal Election Commission notified your clients, Dan Benishek and Benishek for Congress and Joseph A. Shubat, in his official capacity as Treasurer ("the Committee"), of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. A copy of the complaint was forwarded to your clients at that time.

Upon further review of the allegations contained in the complaint and information supplied by you, the Commission, on June 14, 2011, found that there is reason to believe that Dan Benishek violated 11 C.F.R. § 100.93(c)(2) by traveling on non-commercial aircraft in connection with an election for federal office, and Benishek and the Committee violated 2 U.S.C. § 439a(c) and 11 C.F.R. § 113.5(b) by accepting a prohibited in-kind contribution in the form of non-commercial aircraft travel. The Commission also found reason to believe that Benishek and the Committee accepted a prohibited in-kind corporate contribution in violation of 2 U.S.C. § 441b. The Factual and Legal Analysis, which formed a basis for the Commission's findings, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

Please note that you have a legal obligation to preserve all documents, records and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter. See 18 U.S.C. § 1519.

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If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondents.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public.

If you have any questions, please contact Elena Paoli, the attorney assigned to this matter, at (202) 694-1548 or epaoli@fec.gov.

On behalf of the Commission,



Cynthia L. Bauerly
Chair

Enclosure
Factual and Legal Analysis

cc: The Honorable Dan Benishek

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Dan Benishek
Benishek for Congress and MUR: 6421
Joseph A. Shubat, in his official
capacity as treasurer

I. GENERATION OF MATTER

This matter was generated by a complaint filed with the Federal Election Commission by the Michigan Democratic State Central Committee. See 2 U.S.C. § 437g(a)(1).

II. FACTUAL AND LEGAL ANALYSIS

A. Facts

In 2010, federal candidate Dan Benishek sought Michigan's 1st District House seat, filing his Statement of Candidacy on February 12, 2010. The First District constitutes Michigan's Upper Peninsula and a portion of Northern Michigan. Benishek for Congress and Joseph A. Shubat, in his official capacity as treasurer ("Committee"), also filed its Statement of Organization on February 12, 2010.

The complaint bases its allegations on an October 2010 newspaper article (attached to the complaint) noting that Benishek for Congress posted a photograph of an airplane on a runway on the Benishek for Congress Facebook page, with the caption, "Headed out to the Home Show in Munising. See ya there!" See Complaint at 3; see also Facebook Page. According to the article, St. George Glass and Window in Iron Mountain, Michigan, owns the airplane. Brandon Hubbard, *Petoskey News-Review*, "Stupak-seat race: Dems accuse Benishek of unclaimed plane rides; GOP says Dems backing Wilson as spoiler," October 26, 2010. Steven Zurcher, the company's owner, did not respond to a reporter's request for comment. *Id.*

1 The Committee reportedly acknowledged that since March 2010, Benishek had taken two
2 flights that "although arguably personal in nature, may need to be reimbursed at a commercial
3 charter rate."¹ *Id.*; complaint at 2. The complaint, thus, alleges that Benishek "has repeatedly
4 violated" the Commission's non-commercial aircraft travel prohibition.

5 In response to the complaint, Benishek and the Committee state that "on two isolated
6 occasions," Benishek flew with Zurcher, his longtime friend, in Zurcher's private two-passenger
7 plane to "Political Party" events. Benishek and Committee Response ("Benishek Response") at
8 1-2. Benishek and the Committee state that the events were not sponsored or affiliated with the
9 Benishek campaign. *Id.* at 2. The Committee's 2010 Post-General disclosure report, filed
10 December 2, however, reveals a \$2,250 disbursement on October 21 to Zurcher for "Travel."

11 The Benishek campaign posted videos on its website and on YouTube including
12 speeches and direct "talks" by Benishek about his campaign travels. *See*
13 www.benishekforcongress.com/media; Benishek2010's YouTube Channel, *available at*
14 <http://www.youtube.com/user/Benishek2010>; and Benishek4congress YouTube Channel
15 (accessible directly from the Committee's Facebook page). One video, dated April 11, 2010, and
16 entitled, "Dr. Dan Benishek talks about his day after attending the Munising Home Show,"
17 *available at* <http://goo.gl/DukKK>, includes the following caption: "On April 10, 2010,
18 congressional candidate Dr. Dan Benishek attended Tea Party Express events in Cheboygan and
19 Petoskey, MI. After those busy events, Dan was flown out to Munising, MI to make an
20 appearance at the Munising Home Show. After the event, Dan tells us about the busy day ..."

¹ Because House candidates are prohibited from using non-commercial aircraft travel when flying as "campaign travelers," *see* pp. 3-4, reimbursement would not be allowed.

(emphasis added). In the video, Benishek talks about his weekend, which included going to Tea Party events, and then states:

and then we came back up to Munising to do the home show. So we got to shake a lot of people's hands and to see a lot of the constituents, and meet a lot of people and tell them where I stand on the issues. ... We've certainly had a busy weekend. We've put over 1,500 miles on the car, and a little flying as well. And so we appreciate your continued support and we'll see you next time on the trail.

(emphasis added).

Other videos from the campaign website and Benishek2010's (YouTube) Channel show Benishek making campaign speeches at "Tea Party Express" events. See April 9, 2010, video entitled "Dr. Dan Benishek speaks on the Tea Party Express about his 2010 campaign," available at <http://goo.gl/oSPps>, and April 17, 2010, video entitled "Dr. Dan Benishek at the Houghton Tea Party," available at <http://goo.gl/ohDpO>. See also Dionna Harris, "Tea Party rolls into Esky," Daily Press, April 10, 2010 ("Also speaking out Friday was Congressional candidate Dan Benishek, who agreed with what was being said.").

B. Legal Analysis

The Honest Leadership and Open Government Act of 2007 ("HLOGA"), which became effective on Sept. 14, 2007, changed the Federal Election Campaign Act of 1971, as amended ("the Act"), by prohibiting House candidates from making expenditures for non-commercial aircraft travel. 2 U.S.C. § 439a(c)(2). The Commission promulgated implementing regulations that became effective Jan. 6, 2010. See Explanation and Justification, 74 Fed. Reg. 63951 (Dec. 7, 2009). The regulations provide that House candidates are prohibited from non-commercial air travel on behalf of any such candidate or any authorized committee of such

1 candidate, 11 C.F.R. § 100.93(c)(2), and from accepting in-kind contributions in the form of non-
2 commercial air travel. 11 C.F.R. § 113.5(b).²

3 The prohibition applies to a House candidate who is a "campaign traveler," which
4 includes, "any candidate traveling in connection with an election for Federal office or any
5 individual traveling in connection with an election for Federal office on behalf of a candidate or
6 political committee." 11 C.F.R. § 100.93(a)(3)(i)(A).

7 Further, the Act prohibits corporations from making any contribution in connection with
8 a federal election, and prohibits candidates and committees from knowingly accepting such
9 contributions. 2 U.S.C. § 441b. "Contribution" includes any gift, subscription, loan, advance, or
10 deposit of money or anything of value made by any person for the purpose of influencing any
11 election for Federal office. 2 U.S.C. § 431(8).

12 Benishek and the Committee assert that "Benishek has never used a private plane for
13 purposes of 'campaign travel' 'on behalf of' his own campaign. On the contrary, Benishek has
14 only accepted invitations for personal travel from a close friend to attend Party-related events
15 unaffiliated with the Benishek campaign." Benishek Response at 2 (emphasis in original). They
16 conclude that Benishek is not a "campaign traveler" under the Commission's rules. *Id.*

17 The available information suggests, however, that Benishek took a prohibited non-
18 commercial flight to campaign at the Munising Home Show. On April 10, 2016, the day of the
19 Munising Home Show, the Committee posted on its Facebook page a photograph of an airplane
20 on a runway, with the caption, "Headed out to the Home Show in Munising. See ya there!" See

² There are two exceptions to the ban on non-commercial aircraft travel for House candidates that are not relevant here: travel on government-operated aircraft and aircraft owned by the candidate or members of the candidate's immediate family. See 11 C.F.R. §§ 100.93(e) and (g), 113.5(c).

1 Attachment 1. Such a photograph and description indicate that Benishek used air transportation
2 to attend the event.

3 Further, a Benishek2010's YouTube Channel video includes a caption noting that the
4 candidate flew to Munising "to make an appearance at the Munising Home Show." See April 11,
5 2010, video entitled "Dr. Dan Benishek talks about his day after attending the Munising Home
6 Show," available at <http://goo.gl/DukKK>. In the accompanying video, Benishek states he went
7 to Munising "to do the Home Show." *Id.* He then recounts that he met a lot of people, shook a
8 lot of hands, saw a lot of constituents, and told them "where I stand on the issues." *Id.*, see also
9 www.benishekforcongress.com/media. These activities appear to constitute campaigning. He
10 also acknowledged in the same video that he did "a little flying." Thus, Benishek meets the
11 definition of a campaign traveler because he flew to the Munising Home Show in connection
12 with his election for federal office.

13 It appears that St. George Glass and Window, a Michigan corporation, provided the plane
14 that transported Benishek to the Munising Home Show. As noted above, the complaint includes
15 an article reporting that the registration of the plane posted on the Benishek Facebook page
16 identifies St. George Glass and Window as the owner of the aircraft.

17 Additionally, the available information indicates that, contrary to Benishek's assertions,
18 Benishek did campaign at "party-related events." The aforementioned April 9 and 17, 2010,
19 videos of Benishek at Tea Party Express events in Escanaba and Houghton, respectively, show
20 him giving campaign speeches (Escanaba – "I'm Dan Benishek, a general surgeon, and I'm
21 running for Congress because enough is enough!"); (Houghton – "Hi. I'm Dan Benishek, and
22 I'm running for Congress."). Benishek's response acknowledges that he took two flights on

1 "Zurcher's"³ plane to "party-related events" but does not identify the events in question or
2 disclose any further information.

3 Based on the foregoing, it appears that at a minimum, Benishek flew to Munising on a
4 non-commercial airplane in connection with his campaign.⁴ Therefore, the Commission has
5 determined to find reason to believe that Dan Benishek violated 11 C.F.R. § 100.93(c)(2) by
6 traveling on non-commercial aircraft, and Dan Benishek and Benishek for Congress and Joseph
7 A. Shubat, in his official capacity as treasurer, violated 2 U.S.C. § 439a(c)(2) and 11 C.F.R.
8 § 113.5(b) by accepting a prohibited in-kind contribution in the form of non-commercial aircraft
9 travel. The Commission has also determined to find reason to believe that Dan Benishek and
10 Benishek for Congress and Joseph A. Shubat, in his official capacity as treasurer, violated
11 2 U.S.C. § 441b by knowingly accepting a prohibited in-kind corporate contribution.

³ As noted above, there is information that the plane is registered to St. George Glass and Window, not Zurcher.

⁴ Immediately after concluding that Benishek was not a "campaign traveler," Benishek and the Committee argue that assuming he were a campaign traveler, a party committee could have paid the cost of the airfare. The available information does not suggest that a party committee did so or that Benishek was traveling on behalf of a party committee. See 11 C.F.R. § 100.93(c)(3).